Supreme Court, U.S.
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No. 90-1801

In the Supreme Court of the United States

October Term, 1990

BOSTON TEACHER UNION LOCAL 66,
Petitioner,

v.

TALLULAH MORGAN, et al.,
Plaintiffs-Respondents,
and
DANIEL R. BURKE, et al.,
Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT BRIEF IN OPPOSITION

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Statement of the Case

Boston School officials engaged in a multi-faceted program of racial discrimination, including discrimination in the hiring of teachers and the selection of administrators.[1] As a consequence, in the early 1970's the system's faculty was only 5.4% black and its administrators only 3.5% black.[2] Court-ordered remedies for these violations began in the summer of 1974 (interim relief, faculty);[3] and continued with the principal faculty remedy in

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[1] Morgan v. Hennigan, 379 F. Supp. 410, 463-66, 482 (1974), aff'd, 509 F. 2d 580, 596-98 (1st Cir. 1975), cert. denied, 421 U.S. 963 (1975).

[2] Morgan, supra, 379 F. Supp. at 463.

[3] Morgan v. Kerrigan, 509 F.2d 599, 600 (1st Cir. 1975).

1975,[4] as well as the "Order for Desegregation of Administrative Staff" in 1976. The remedies were adjusted from time to time to address additional problems, or imperfect compliance.[5]

In 1990, the district court considered the entry of a final judgment. Pet. App. at 6a.[6] In written submissions and at a hearing, several parties made, inter alia, two points. First, the school system had yet to achieve compliance with seven elements of the remedies addressing staff issues. Pet. App. at 5a-6a. Second. As a result of the hiring violations noted above and

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[4] Morgan v. Kerrigan, 388 F. Supp. 581 (1975).

[5] Morgan v. Nucci, 831 F.2d 313, 327-28, 330 n.26 (1st Cir. 1987).

[6] As the petition notes (at 12-13), the district court has been sensitive to the need to diminish the scope of its jurisdiction.

imperfect compliance with the resulting remedial orders, the pattern of seniority among teachers and administrators was racially skewed; i.e., on average, white staff had greater seniority than black and other minority staff. Data supporting this thesis was offered. Pet. App. at 8a. It demonstrated "that any substantial layoff of faculty in reverse order of seniority, as provided for in the collective bargaining agreements, would undo in a day what had taken years to accomplish." Id.

The district court following a hearing made several pertinent findings: (1) "Experience shows that complete compliance [with the staff composition remedies] is within reach." Pet. App. at 19a. (2) "[S]eniority under applicable collective bargaining agreements would not now be a racially neutral standard

for likely reductions of faculty and staff." Id. (3) "In our opinion, the need for desegregated faculty still obtains...." Id.

The district court then entered a final judgment including paragraph (3), which prompted the BTU's appeal. Paragraph (3) addresses three matters: achievement of compliance with the staff composition remedies; the standards for any "reduction in force" while the provisions of the paragraph remain in effect; and the ultimate expiration of all orders in the paragraph. Pet. App. at 17a.

On appeal, the Court of Appeals affirmed the district court's judgment, as modified. Pet. App. 14a. The court explicitly rejected BTU's contention that the expiration provision is unworkable. Pet. App. 13a.

Argument

As the Focal Point of the Petition Was Not Raised Below, and for Other Reasons, Review Should Be Denied

This case simply does not present an important question of federal law yet to be resolved by this Court, or conflict in the circuits.

First. There is no issue of excessive intrusion on the prerogatives of state and local school authorities. Compare, Board of Education of Oklahoma City v. Dowell, 111 S.Ct. 630, 637 (1991). These officials, who appeared in the Court of Appeals to support affirmance, appear here to oppose review.

Second. This case presents no issue regarding the permissible scope of affirmative action in layoffs. Pet. at

10, 19. As the Court of Appeals notes (Pet. App. at 11a, n.2), BTU did not raise that issue below.

> "We note that BTU does not challenge the district court's remedial power to override seniority per se. See Wygant, 476 U.S. 267 (raising some question of the appropriateness of race-based layoffs to address any governmental interest). See also Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982) (affirming at an earlier stage in this case the imposition of seniority override layoffs, vigorously challenged at that time by BTU)."

Instead, BTU's focus below was the permissible duration of the district court's authority to address staff composition issues. Pet. App. at 11a.

Third. In Boston, the racially-skewed pattern of seniority is an "effect" or "vestige" of the earlier intentional discrimination in hiring. Accordingly, the district court adopted

the correct rule as to duration of remedies to prevent the carrying forward of earlier intentional discrimination. See Board of Education of Oklahoma City v. Dowell, 111 S.Ct. at 637 ("...a federal court's regulatory control of such systems [should] not extend beyond the time required to remedy the effects of past intentional discrimination"); see also id. at 638 ("whether the vestiges of discrimination had been eliminated to the extent practicable" [footnote omitted]).

Fourth. Two lower courts have found that the expiration procedure is workable. Pet. App. at 13a. Both have had considerable experience with personnel matters in the Boston Public Schools, as the case citations in this brief show. If time leads to doubts on this point, BTU will be free to petition the district court for a modification of

its judgment.

Respectfully submitted,

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* The plaintiffs are all black students in the Boston Public Schools and their parents, and the plaintiffs-intervenors all Hispanic students in the system and their parents.